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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1005

EARL E. HOWE,

Petitioner,

VS.

GENERAL MOTORS CORPORATION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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Petitioner, Earl E. Howe, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on October 16, 1968.

OPINIONS BELOW

For the Court's greater convenience (Rule 23 (i)), they are printed in a separate 70 page booklet, "Opinions and Statutes Accompanying Petition for Writ of Certiorari."

The opinions of the four trial court judges, of whom Judges La Buy and Perry heard the case before juries, are those of Judge Picard in a related case, *Earl E. Howe* v. *Atwood Vacuum Machine Co.*, 47 F. Supp. 979-990 (E.D. Mich., S.D., October 7, 1942) (D.A. III 2141-52; separately printed booklet pp. 1-9), in which, after trial for recovery of royalties from Atwood which had repudiated its sublicense from Howe under strange circumstances in the hope, with General Motors' aid, to defeat Howe's patent, the verdict was for Howe; of Judge La Buy in the case at bar, 54 C 1893, 167 F. Supp. 330 (N.D. Ill., E.D., October 17, 1958) (P.A. 51-62; printed booklet pp. 10-21), in which, after a separate trial before him alone on the defense of laches and acquiescence, he found for Howe (the jury later hung on the other issues); of Judge Perry, in the case at bar, 54 C 1893, on why he granted a new trial, *unreported,* but it appears in the proceedings before him on September 29, 1961, upon defendant's denied motion that he set aside the new trial order (D.A. III 2155-2160; printed booklet pp. 22-27); of Judge Robson, 252 F. Supp. 924 (April 5, 1966) (P.A. 734), in which he states his legal conclusion on the issue of validity "is not as clear-cut as might be desired" (printed booklet, p. 54) (issues of GM employee being prior inventor and infringement

were left open); and of the Court of Appeals for the Seventh Circuit, 401 F. 2d 473 (July 15, 1968), in which it stated "the analytical steps prescribed in *Graham* for the resolution of the obviousness issue were not as meticulously set forth as is desirable" (printed booklet, p. 59). The very brief opinion of the same Court denying the defendant's petition for mandamus to compel Judge Perry to set aside his order for a new trial, appears in 303 F. 2d 545 (April 23, 1962), but is not reprinted in the booklet. Substantially the same "prior art" was before the above four trial judges, in hearings lasting in the aggregate about four months.

JURISDICTION

The judgment of the Court of Appeals was entered on July 15, 1968. A timely petition for rehearing was denied on October 16, 1968. The judgment order was modified as to costs on November 13, 1968. By order, dated December 30, 1968, Mr. Justice Thurgood Marshall extended the time to petition for certiorari to, and including, February 3, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Request is made that the certified copies of the Court of Appeals' judgment orders of July 15, 1968, October 16, 1968, and November 13, 1968, and of its opinion of July 15, 1968, attached to the application to enlarge time, be transferred to the Record.

QUESTIONS PRESENTED

Petitioner secured letters patent directed to

> "a gooseneck hinge of the *pintle* or hinge pin type for swingingly supporting a door of an automobile from a curved body wall (that is, one with 'tumble in') with a double inclination of the hinge axis to compensate for the tumble-in angle of the body so that the door can swing in a substantially horizontal arc. All of the claims in the Howe patent are limited to a *concealed* hinge for supporting a door on a curved or inclined wall with the axis of the hinge having a double inclination so that the door in opening and closing swings through a substantially horizontal arc." (Judge La Buy's Finding No. 4, p. 11 of booklet of opinions, and P.A. 52)

The difference between petitioner's hinges and those made before his invention is that, whereas earlier hinges were relatively simple structures because they were adapted to support merely 10 or 15 lb. wood or composite doors in carriages or roadsters without tops, or pull down tops, and with their unmouldable, inflexible frames made of wood, or of wood with sheet steel nailed over them, petitioner's inclined hinges with inclined pintles supported the all-steel, modern, mouldable, curved, streamlined doors on all-steel, modern, mouldable, curved and streamlined automobile bodies, which door, with glass window sliding in it, weighed 100 or more lbs. His hinges, moreover, were so constructed and attached as to be *completely* and absolutely concealed from any inside or outside view when the door is closed, so as to eliminate and replace the unsightly, dust, dirt, grime collecting and wind resistant and noise generating, pro-

truding, and exposed hinges and to make it possible, at the same time, to align properly the swinging curved door into the curved body opening, a feat which now, in hindsight, seems simple and obvious but which baffled for almost a decade the leading hinge manufacturers, and auto makers, and which their extraordinarily skilled engineers stated could not be done without having at least one hinge on the door protruding and exposed to an outside view when the door was closed in closed bodies.

The question presented is whether the ruling of the court below, holding the patent issued to petitioner invalid for obviousness, departs seriously from the constitutional and statutory standard of invention, and the accepted and usual course of judicial proceedings.

STATUTES INVOLVED

The separately printed booklet, "Opinions and Statutes Accompanying Petition for Writ of Certiorari", contains verbatim Title 5 U.S.C. secs. 1; 597; 1091; 1009; and Title 35 U.S.C. secs. 101; 102; 103; 141; 145; 282.

STATEMENT

The Court of Appeals Record consists of four, very thick volumes. The buff-covered one, "Appendix to Brief for Plaintiff-Appellant" will be referred to herein as P.A. The others, blue-covered, "Appendix to Brief for Defendant-Appellee", will be referred to as D.A., with the number of the volume suffixed as I, II, and III. "Invention" means patentable invention, unless indicated otherwise. "Specification" means the totality of its three parts which will be referred to each, for greater clarity, as drawing, description, and claims.

This suit was brought against General Motors, under 35 U.S. secs. 281 and 284, to recover for infringement of an invention covered by United States Letters Patent No. 2,201,490, issued May 21, 1940, to petitioner, Earl E. Howe. The invention is a concealed type hinge structure whose axis, as well as the axis of its pintle, is inclined, both being completely and absolutely concealed from any inside and outside view when the door is closed. Simply stated, the Howe completely concealed and inclined hinge has, since its commercial adoption in 1940 by the leading automobile manufacturers to this very day, almost 30 years, replaced the conventional, exposed and protruding hinge, which was most unsightly, collected dirt, dust, grime, making lubrication difficult, and which resisted the wind and generated disturbing noises, and so affected the auto's progressive forward movement, at the same time that it made possible the easy alignment of a heavy all-steel, swinging curved door, carrying a heavy glass window, into the all-steel, curved automobile body opening to avoid excessive "tumble-in"

(i.e., too rapid closing of the door which would otherwise strike the foot and ankle, injuring and possibly maiming them, of a person entering or leaving the auto) and to permit the door to swing substantially parallel to the ground so it would fit into the curved all-steel closed body and close securely.

Earl E. Howe, now 75, became identified with the automobile industry at its infancy, in 1912 (D.A. I, 3, 613). Then just out of high school and a year of a collegiate level technological school, he became associated with the inventor of the demountable wheel and rim (under whose patents, GM was a licensee for over 20 years), as an assistant in development work in the Detroit area. Over the years, he has participated in, or made developments relating to the automobile. He had thus become acquainted, and was on friendly terms, with various engineering and other executives of General Motors. With many, he stood in a confidential relationship (D.A. I, 49, 311; D.A. II 1222-41; 1648-1653). When the mouldable, streamlined De Soto curved, all-steel automobile body replaced the square, inflexible, wood or composite frame bodies of automobiles (in 1930), how to hinge the heavy, curved, all-steel doors on the all-steel curved bodies to keep their front and rear doors from "tumbling-in" (making it hard to open the doors) became a very serious and vexing production and sales problem that never existed when conventional hinges were used on 5 to 10 lb. doors, as can be envisioned readily. Since the conventional hinges, moreover, were often not in alignment, pinch bars had to be used to "persuade" or "jimmy" the door and thus often bend the hinges to align the door with the body opening (Picard, J. opinion, separately printed booklet, p. 5).

The Howe hinges, being in alignment as the novel and unexpected result of his invention, overcame the difficulties theretofore due to misalignment.

Since everybody in the industry was aware of these problems, Howe naturally became aware of them also. He began to study and to experiment, in 1935, how to provide concealed hinging on "tumble-in" bodies without excessive lift in opening modern auto doors. He finally solved the problems, in early 1938, by a novel hinge construction based on principles that the prior art never taught manufacturers of hinges for the modern, curved and streamlined automobiles, nor the thousands of automobile stylists, design engineers, and various echelon experts employed by Ford, Packard, Studebaker, Nash, Chrysler, General Motors, who used hinges in auto assembly, nor other independent inventors, such as Howe, identified with the industry.

He disclosed his invention, soon after he filed his United States patent application, on January 9, 1939, and its novel, ingenious and unexpected mode of operation to his engineer and executive officer friends at General Motors in confidence, with the expectation of compensation, which they well understood, if they accepted his hinge as was very likely, since GM knew its well known competitors were about to. They recognized its novelty then ((D.A. I, 31-32), after they investigated his invention's patentability (D.A. I, 31; 33; 47-48; 51), and wanted to know if it could get a license (D.A. I, 32) for its Ternstedt Manufacturing Division which made its conventional hinge. Howe had made and demonstrated to its top executives and engineers a number of models and drawings, and even prepared and submitted full-size models for automobile installations (Judge La Buy's

opinion in separately printed booklet, p. 15, P.A. 56, Finding No. 17). Without taking a license, or compensating him (D.A. I, 30; 33; 51; 59; 749), GM began to use the Howe hinge structure on their "tumble-in" automobile bodies to keep abreast of its competitors, Packard, Chrysler, Studebaker, Nash, who were being supplied with the Howe hinge by Howe's sublicensee, Atwood Vacuum Machine Co. On June 21, 1940, soon after his patent issued, on May 21, 1940, Howe charged GM with infringement (Judge La Buy's opinion, separately printed booklet, p. 16, P.A. 57, Finding No. 21). He was given the "run-around" (D.A. I 40). At first, he was advised that his patent would be investigated, then that it was anticipated by prior patented and unpatented art (D.A. I, 29; 35-36; 54), and then, finally, that a General Motors employee was the prior inventor (D.I. 77; Judge La Buy's opinion, p. 16 in separately printed booklet; P.A. 57, Finding No. 17).

After prolonged and fruitless efforts to get recognition, Howe advised General Motors that he must look to the courts for protection (D.A. III, 1846-47).

In addition to Judge Picard's opinion (D.A. III, pp. 2141-62; separately printed booklet 1-9), the Record contains also Plaintiff's Exhibit No. 37 (D.A. III, pp. 1761-1772) which is a narrative of proceedings in the trial of *Howe* v. *Atwood* before him, in 1942. Judge Perry's opinion (D.A. III, pp. 2155-60; separate printed booklet, pp. 22-27) stated at pp. 25-27, having tried several score patent cases (D.A. II, 458):

> ". . . had it been a non-jury case, I would have found the patent good and would have found infringement, and that is really the heart of why I granted a new trial, because I think it is my duty

> to give my best opinion as to what justice should ultimately be and I thought it was a valid patent and I thought it was infringed. . . I spent over a month in trying that case. I spent hours and hours on the briefs in this matter. . . If ever I saw a good patent, that was it. . . It was my best judgment, and I told you my opinion as to the law and as to the facts is that there was a good patent, and that it was infringed . . . after spending five weeks in trial on it and then weeks going over the briefs, and so on, hours and hours."

The point will be developed further, under the section why the petition should be granted, that the decision as to the validity of the Howe patent, hereinafter referred to as '490, was for Judge Perry, and not for the jury, and that, consequently, his denials of the defendant's motions for a directed verdict and to set aside the order for a new trial were really a withdrawal of the issue of validity from the jury and a holding which became *res judicata* and foreclosed and precluded further trial before Judge Robson, unless and until the reviewing court reversed Judge Perry and remanded for a new trial.

GROUNDS FOR GRANTING THE WRIT

Graham, 383 U.S. 1, quoted the Reports in Congress that § 103 (separately printed booklet, p. 70) would have a stabilizing effect and minimize great departures which have appeared in the cases, and stated that it was added for uniformity and definiteness (383 U.S. at pp. 15, 18). It stated also that this section was cast in relatively unambiguous terms (at p. 14), implying it should be easy for the courts to follow. In the preparation of this Petition, Counsel has studied, with some care, about 125 decisions of reviewing courts in every Circuit, about 75 of which are post-*Graham,* to form some judgment as to trends. The impression is distinct that some courts continue to deliberately disregard this Court's guidelines in *Graham* and *U. S.* v. *Adams,* 383 U.S. 39,[1] while others, though giving lip service, nevertheless, disregard them in many instances. Most of them, however, are still confused and perplexed by such questions as whether prior art in Title 35 U.S.C. § 102 is pertinent on the issue of novelty under § 103, when a study of the history of the legislation indicates that § 102 references can go only to anticipation, or lack of novelty, and § 103 was made separately to go to lack of invention or obviousness only; whether the differences into which the court may inquire are solely structural or whether the purposes of the prior inventions and their results may be taken into consideration also under § 103; the differences in function between the courts and jury trials in patent infringement suits are being confused; what is meant by taking the subject matter of the claimed invention *as a whole*; the boundaries or pertinency of permissible

[1] See C.A. 7 instance, p. 28 of this Petition.

"prior art"; whether, in considering prior art which is non-anticipatory, it may consider disclosures in such prior art, nevertheless, on the issue of lack of invention or obviousness,[1] even though they may be speculative, vague or their elements render the structure inoperative; whether a non-file wrapper reference *per se* weakens or destroys completely the presumption of validity under § 282, or whether its relevancy and the presumption that the Patent Office did not overlook it must be considered first, the burden of proof to the contrary under § 282 being on him who asserts the destruction or weakening of the validity presumption, or whether the sounder rule should prevail that inquiry must first be made whether the file wrapper references are equally or more pertinent than an omitted reference; the distinction between the trial court's erroneous conclusions as to the ultimate question of patentability or its erroneous conclusions as to facts on which a conclusion rests; whether foreign patents and publications cited as anticipatory must meet the same tests as domestic ones under § 112; may a trial court disregard the "sub-tests" even though it may express doubt or reservation as to its legal conclusion on the validity issue.

The space allotted for a Petition, and much less that allotted to the section of the Petition for stating the grounds why it should be granted, will not permit a superficial treatment even of all these questions, nor even full treatment of some of the major ones only. If this Petition should be granted, they will be treated in depth in Petitioner's brief. Suffice it that, in Counsel's study of about 25 articles, notes and comments in sundry law reviews relating to these questions, he noted

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[1] *Toro* v. *Jacobsen*, 357 F. 2d 901, 902-903 (C.A. 7, March 4, 1966)

considerable agitation over the failure of a number of lower courts to resolve these problems satisfactorily; several have suggested, therefore, that this Court grant a few more writs to straighten out the kinks before they become too set in various circuits precedentially.[1]

As a result of this agitation, there is now pending in Committee S. 1042 for a drastic revision of Title 35, on which considerable hearings have been held. It will be reintroduced at this coming session of the Congress.

The case at bar, moreover, contains a fact pattern that takes it beyond *U. S.* v. *Adams* on which this Court does not seem heretofore to have established guidelines, in which case it may wish to set them forth for the guidance of the Bench and Bar in similar future situations. Herein will be considered also the presumption of the correctness of the decision of the Patent Office, until Title 5, §§ 1,597, 1001, 1009, and Title 35, §§ 141 and 142 (printed booklet, pp. 69 and 70) creating a double presumption in a patentee's favor. More space is prayed.

In the case at bar, Judge Robson's Decision on the Merits (P.A. 708-737, printed booklet, pp. 28-57) falls within that group of decisions that honor this Court's guidelines more by their breach than by their observance. It is needlessly prolix; though the trial ended before him on March 9, 1965, Judge Robson's decision was not announced until April 5, 1966. Seemingly, it was held up

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[1] The following articles seem to point in that direction: The 1966 Patent Cases, 54 Georgetown L.R. 1320 (Summer, 1966); Discussion of the *Graham, Calmar* and *U.S.* v. *Adams* cases, 34 Geo. Wash. L.R. 802 (1966); Insufficient Disclosure, Obviousness and the Reasonable Man, 49 J.P.O.S. 387 (June, 1967); Utility Requirement in § 101, 49 J.P.O.S. 533 (July, 1967); Impact of S. Ct. § 103 cases on Standard of Pat., 35 Geo. Wash. L.R. 818 (1967).

until this Court decided *Graham* and *U. S.* v. *Adams,* on February 21, 1966. *Graham* is referred to inadequately and in the *Conclusion* only (P.A. 734-736, printed booklet, pp. 54-56), as an appendage to what had been prepared before *Graham,* and as affording a seeming analogy of obviousness. *U. S.* v. *Adams,* whose factual pattern, as will be seen, the case at bar resembles very closely, it ignored entirely. The decision contains downright inaccuracies. It ignored the vital, critical facts needed to a correct determination that, as a matter of law, Howe's patent was anticipated and his claimed inventions were obvious to a skilled worker in the field. He merely compared the parties' respective views on each "prior art" reference without attempting even a definition of the "prior art" to which the patent's subject matter pertains, and without a critical, independent interpretation or evaluation, indulging in much generality, nor did he point out the disclosures specifically from which a legal conclusion could be drawn that Howe's claimed inventions *as a whole* would be obvious to someone whose level or skill he did not attempt to define either. There was no "substantial" compliance even with the steps that must be followed *strictly* to insure the objectivity, certainty and definiteness sought by § 103. The Record does not support Judge Robson's conclusions which seem to be more of the sought-to-be outmoded "judicial hunch" than a carefully prepared and reasoned judgment.

The threshold question is: Was Judge Perry's unequivocal and repetitive legal conclusion (pp. 9-10 of this Petition; P.A. 710, printed booklet, p. 30; D.A. III 2158-59, printed booklet, pp. 25-26) that the patent in suit was valid and infringed, upon denial of defendant's motions for directed verdict (P.A. 87-95, 103, 104; D.A. III 2161-62), and to set aside his order for a new trial

(D.A. III 2153, 2155-60) tantamount, in principle and in the "accepted and usual course of judicial proceedings", a withdrawal from the jury of that determination, since it was beyond the jury's province to decide the patent's invalidity, so that it was error for District Judge Robson to proceed to again give judgment on the validity issue, sitting virtually in review of District Judge Perry's determination, and it was error for the Court of Appeals to sanction Judge Robson's departure? It denied, however, on April 23, 1962, the defendant's petition for mandamus against Judge Perry.

It is to be noted, parenthetically, that the proceedings before Judge La Buy comprise the entire 850 pages of D.A. I, and he, likewise (after hearing virtually all that Judge Perry later heard, both having heard more than Judge Robson heard later still) denied two motions of defendant for directed verdict (during the jury trial, P.A. 9, on May 27, 1960; after the close of all the evidence on validity and infringement before the jury, P.A. 10 and 11, on September 27, 1960).

In *Swofford* v. *B & W,* 395 F. 2d 362 (C.A. 5, 1968), the trial judge, in a patent infringement suit heard before a jury, withdrew from the jury the determination of the validity issue and was upheld in an exhaustive and scholarly review of the law on the subject since *Keyes* v. *Grant,* 118 U.S. 25, 37 (1886) to date, stating this is the law in the Seventh, as well as in other, Circuits, citing *Armour* v. *Wilson,* 274 F. 2d 143, 147 (1960), which was before Judge Perry and a jury heard the case, and concluding so recently: "We find no recent decision holding otherwise."

At almost the very outset of his decision, Judge Robson states the Record incorrectly in at least three respects,

indicating that it was not prepared with the degree of thoroughness that the case warranted, after three equally able judges had preceded him in longer trials. For example, P.A. 711, printed booklet, p. 31, states that notice of infringement was given on "July 10, 1942." The Record shows it was given on June 21, 1940, about two years earlier and one month after 490 issued on May 21 1940 (P.A. 57, booklet 16, Judge La Buy's Finding No. 21). Immediately following, the decision purports to state the charge in the Complaint (filed December 17, 1954) (P.A. 28) and Supplemental Complaint (filed November 6, 1958) (P.A. 64), creating the impression that "front" door hinges only were charged to infringe. Par. 4 of the Complaint does not so limit the charge. His decision then set out the charge specifically (P.A. 712, booklet, p. 32, footnote 1). Item Nos. 12, 14, 18, 26, and 36, which appeared in par. 4 of the response, on April 1, 1955, for a more definite statement (P.A. 43) are all for rear doors (the items are listed and described in P.A. 38-42).

Again, the statement further down on the same page (P.A. 711, booklet, p. 31) quotes the first par. of 490 and proceeds to construe it so as to lay the foundation for an agreement with defendant's urged construction that Howe sought broad claims to cover a *concealed* hinge which embraced partially concealed hinges or hinges concealed in a manner other than shown by the '490 specification, in any *milieu* and for any purpose, directly contrary to the teachings of Howe's claims, construed properly in the light of his description and drawings (P.A. 720, booklet, p. 40, last par.). On the basis of this erroneous construction, it was inevitable Howe's claims would read on the art adduced by the defend-

ant, and so would be invalidated for anticipation (Judge Robson decision, P.A. 710, booklet, p. 30).

The reviewing court stated, however, that "Defendant did not prove, as prior art, any similar combination in tumble-in bodies" (P. 66, bottom of printed booklet), but, considering the tumble-out prior art on the issue of obviousness, "It is *perhaps possible* to say that the Howe patent claims were *anticipated* by the tumble-out prior art." Here is an example of confusion between §§ 102 and 103 and lack of definiteness and certainty. Judge Robson's opinion seems to have dropped the conclusion of anticipation with which the decision began (P.A. 710, booklet, p. 30) when he reached the *Conclusion* which was devoted exclusively to analogizing *Graham* on the issue of obviousness. Judge Robson then passed the issue of infringement (P.A. 736, booklet 56). The decision thus really turns on whether what Howe did would have been obvious to engineers of substantial training, and specialized skill, the level of skill "in the pertinent art" which the reviewing court found to fill the gap in Judge Robson's decision (Booklet, p. 67, top). Neither Judge Robson, nor the reviewing court, referred to *U. S.* v. *Adams.*

The Record does not support in the slightest Judge Robson's conclusion that the defendant's cited prior art taught Howe his invention or that it was miniscule. To understand what Howe did, it is well to study Howe's full testimony of the meaning of his specification and how GM copied it (P.A. 625-680). In reviewing '490, (D.A. III 2148-2151, booklet 5-8), Judge Picard summed up the 1939 B.O.P. and Smith's 1936 patent defenses in a nut shell:

> "There is also some evidence that the double inclination principle was in the 1937 Chevrolet car, the first showing of which was made in 1935. In fact, defendants claim that thousands of cars embodying the Howe patent were on the streets in 1937 except that the body tumbled out instead of in. But another distinction was that the hinges were exposed. Here the hinges are concealed and of the gooseneck type, *undoubtedly patentable in itself*. We believe it is fair to assume that if this idea was so prevalent in 1938 defendants should have known about it. Atwood Vacuum was in the hinge business and we cannot understand their interest in plaintiff's hinge in 1939-40, particularly their desire to insure the proper scope of the claims, if such a hinge was already on the market."

In his deposition, Ward, of Fisher Body's Patent and New Devices Section, swore (D.A. I, 143), referring to Howe's drawing (P.A. 691) of his invention, dated August 23, 1937 (within the 2 year statutory period of filing his application on January 9, 1939), that "if proved, would antedate our first product showing a compensating hinge arrangement in which at least one of the hinge units is concealed." Judge Picard's opinion states the Howe drawing antedated GM's of November, 1937 (D.A. III 2150, booklet 7). Howe testified he made his first drawing in March, 1937.

The Record supports the conclusion that what Howe did was novel, ingenious, inventive and produced unexpected results. P.A. 123-24 and 134-40 recited in considerable detail Fisher Body's activities, and that of the Ternstedt Division which made the hinges for Fisher Body, during the 1935-1938 period, to support their defense they solved the hinge problem then. Yet P.A. 212-214 shows that when Howe met one of the Fisher Bros.,

in early 1939, after his patent application was on file, in the office of P. J. Mauck, the Fisher Body Chief Engineer, Mr. Fisher asked Howe for his solution to the exposed hinge problem and then instructed Mr. Mauck to let him prove it by working close to them, and to provide him with a set of prints. If Mouche, Richard, Feldwabel, Smith and Carr had taught them the answers, which does not square with the claim that its own employee made the invention, without their disclosures making it obvious, why all the interest and required work? Judge La Buy asked that question (P.A. 56-57, booklet 15-16, Findings 17-20 inclusive) as did Judge Picard.

D.A. I 31-32 shows that GM considered the Howe invention "novel". P. 702 shows GM's advertising Howe's invention as its own, calling it "ingenious".

GM's expert, Lutz, after considerable effort before Judge Perry trying to read Howe's claims on the prior art, had to admit the novelty of Howe's invention and that it produced unexpected results (D.A. II 1599-1600).

Judge Robson leaned very heavily throughout his decision on the construction Hedeen, of GM, posing as an expert, placed purportedly upon the '490 claims. Yet, Hedeen had to disqualify himself also, falteringly (D.A. II 1427):

> Q. "But you didn't read them out of the claims?
> A. Oh, I have nothing to do with the claims. I can read them, but I am not trying to interpret the claims. I mean I am no expert on interpreting claims, Mr. Horton."

Amusingly, Hedeen swore that he never before had heard the word "pintle." Had Judge Robson been aware, before Hedeen was sworn to testify as an expert, he

should not have permitted this. The established law is that one who cannot interpret patent claims can be no expert in a patent infringement suit. What is unexplainable is that, despite the self-disqualification, Judge Robson rested his conclusions virtually on his testimony, except lack of sufficient experience in the trial of patent suits.

The defense under § 102(g) that GM developed the Howe hinge before he did is highly suspect from the Record, and seems to have escaped Judge Robson. The Stipulation between the parties and the defendant's depositions and testimony indicates at least over a dozen instances of original drawings, documents and the like being destroyed prior to 1954, when the suit at bar was filed, or as having been changed in material respects (P.A. 125, 129, 133, 135, 136, 139, 141; D.A. I 356; D.A. II 908, 910, 911-12, 961, 995, 1043, 1045, 1108). How can this evidence be reconciled with Judge La Buy's findings (P.A. 57-58, booklet 16-17, Findings 21-24, incl.) that Howe kept notifying GM of infringement from June 21, 1940, in 1947, 1949, 1951, 1952? One would suppose every precaution would have been taken, under the circumstances, to preserve original and corroborative evidence.

It may be asked further, the discrediting evidence of changes in the drawings aside, as did District Judge Sprague of Massachusetts, when the defense was prior invention by Walter Hunt of the Elias Howe sewing machine:

> "Why did not Walter Hunt and Mr. Arrowsmith take out a patent? Is there any suggestion that they were not able ((financially)) . . . why did they not take out a patent?" (12 Fed. Cas. No. 6775 (1854), *Howe* v. *Underwood*, p. 686)

It is well known that GM tries to get patents on every shadow of a shade as a matter of insurance against infringement suits. Yet it sought neither to get a patent on the Howe hinge nor to have an interference declared. But it did seek and obtained a patent on a minor improvement, called an "assist", by one of its employees of which it bragged in the Record.

Incidentally, the steps in § 103 and this Court's guidelines in *Graham* are traceable to the format (*Howe* v. *Morton,* 12 Fed. Cas. No. 6769 (1860)) which Judge Sprague adopted in the Elias Howe patent infringement suits to implement the contemporaneous *Hotchkiss* v. *Greenwood.* Judge Clifford's opinion in *Howe* v. *Williams,* 12 Fed. Cas. No. 6778 (Mass., 1863) followed, even to laying down the rule that the patent in suit must be interpreted "as a whole" (at pp. 692, col. 1, and 693, col. 2). At page 696, col. 1 is laid down the rule that disclosures in inoperable devices cannot be cited as anticipatory reference under the present § 102 on the issue of novelty, nor, it seems, from Judge Sprague's opinion in *Morton,* at p. 666, col. 1, on the issue of obviousness (lack of invention) under the present § 103.

Nor did Judge Robson evaluate properly the Smith 1936 patent cited as a non-file wrapper reference, despite the evidence of the expert Hedeen that General Motors found it impracticable. Smith was an acknowledged auto body engineer in the very top rank of "engineers of substantial training and specialized skill". Atwood had bought the Smith patent (D.A. III 2149, booklet 6) but it proved so unsatisfactory that, fearful of losing its customers, it sought out Howe to get a license. Smith sought to effect an alignment of the door and the closed body of a streamlined auto by a ball and socket

hinge because (P.A. 751-757) no alignment could be had with pintle hinges unless at least one was exposed and protruding. At P.A. 754, col. 2, top, lines 2-14, he states in unmistakable *haec verba*:

> "In mounting doors on curvilinear or irregular surfaces, as automobile bodies and the like, great difficulty has been experienced in so mounting the hinges that they will not bind and prevent the doors from opening properly. It is common practice to use hinges of the pintle type in mounting the doors on vehicle bodies, *but such hinges require the pintles to be in alignment, and on the modern vehicle bodies that usually means one or more of the hinges must extend laterally outward beyond the surface of the body to such an extent as to afford considerable air resistance to the rapid transit of the vehicle.*"

What the prodigious amount of effort GM could not do with the teaching of its own cited art, and what Atwood Vacuum, one of the largest hinge manufacturers, if not the largest, could not do, and what the leading auto manufacturers could not do, and what Smith stated expressly was impossible, Howe did. Yet Judge Robson shrugged all this off as secondary (P.A. 736, booklet 56) (GM had 700 engineers in 1935, 1000 in 1938 (D.A. II 879-80)) because he equated Graham's changing the wear spot to what Howe did. He disregarded the unexpected result Howe accomplished, after some years trial and tribulation, and did not apply this Court's teaching in *U. S.* v. *Adams,* which followed *Graham* in 383 U.S. 39, if, indeed, he even studied it carefully.

GM could not eliminate the exposed hinge without which it could not support the heavy all-steel door by the concealed hinge alone and it discarded Smith's ball

and socket hinge as not feasible (P.A. 987, booklet 6, entire right hand column, D.A. II 1519).

What was the response of GM's counsel when faced with its own evidence (D.A. II 881-82) in Smith's patent of the impossibility of aligning the door and closed body? His impalpable and tawdry excuse was that Smith was unknown to them (D.A. II 1518).

Judge Robson fell into the error of equating Howe's invention, which was primary or pioneer in the art of hinging tumble-in doors on *closed* all-steel auto bodies, with *Supermarket* (an incompleted, three sides of a wood box), and with Graham's alleged "improvement" of changing the wear spot on his earlier, concededly primary and pioneer invention in the art of chisel plows, for a number of reasons. The nomenclature itself "tumble-in" and "tumble-out" may connote a reversal of something, which to Judge Robson is *per se* non-invention (what of Elias Howe's reversing the position of the eye from the top of the needle to its end which solved the problem of having the thread on the shuttle interlock with the thread through the eye of the needle, and, through such startling result, the interlocking stitch, emancipating housewives forevermore from the drudgery of hand sewing? This was the seventh claim in his patent (*Howe* v. *Williams*, 12 Fed. Cas. No. 6778, p. 689) which unrealistic and a' priori judges would now hold unpatentable under the already shop-worn cliche "invalid for obviousness", and which has stricken down 95% of the patents in the 75 post-*Graham* cases reviewed by Counsel—a national scandal almost, that may produce a drastic revision of our patent laws at this coming ses-

sion of Congress, unless this Court will try to clarify most, if not all, the twilight areas indicated at pp. 11-12 of this Pet.).

The second cause of error was that he confused the non-analogous art antedating the De Soto (1930) all-steel auto, such as Richard (1919), the open car type disclosed in Feldwabel (1920) and Mouche (1922) with the analogous art post-dating De Soto, such as Smith (1936) and Carr (1938) (See Appendix A, this Pet.). Judge Picard saw the distinction clearly and the impertinence of the "tumble-out" art (p. 18, this Pet.; D.A. III, 2148, booklet 5). To reach his determinations, after listening for weeks to discussions of the two arts, Judge Perry was likewise not impressed with the pertinency of the "tumble-out" art (See his long all day charge to the jury, D.A. II 1706-1749).

Is it not remarkable that the men most conversant with the two arts and with Howe's disclosures in confidence to top men in GM and with whom he worked to make full-scale models (P.A. 56, booklet 15, Judge La Buy's Finding No. 17), among them, Barnes, GM's chief patent counsel, Haskins, head of GM's Patent Dept., Mauck, Fisher Body's Chief Engineer, were never called to testify in any of the four trials before Judges Picard, La Buy, Perry, and Robson? They feared to be subjected to cross examination on the arts and Howe's invention, it must be concluded.

The parties entered into a 44 printed page Stipulation (P.A. 107-150) on the work of GM's several Divisions from 1935-38 in the invention of the hinge they claim was the concept of an employee. Judge Robson admitted, notwithstanding, in evidence 80 needless depo-

sitions en masse, subject to a blanket objection. What influence they had on him is unknown. Not one word appeared in the stipulation or depositions that this hinge was like the hinges GM had used on its tumble-out cars. If the reversal, alleged by Judge Robson to have been obvious, was so well known to GM and the auto industry, why was it necessary for GM to spend three years of elephantine labor and so much money, and take so many highly-paid and skilled workers from more productive work, only to end the quest in failure? Smith's 1935 patent application (p. 22 this Pet.) should have taught them they would end in failure trying to align concealed hinges, but they set out to prove him wrong, to end only in confirming what long training, experience, and highest professional skill led Smith to forewarn the industry.

To summarize and to reemphasize: "Tumble-out" bodies were *all* composite-wood frame with sheet steel nailed to the frame. Butt hinges, all exposed outside the body, supported the doors on cars of American manufacture. The doors of the strictly wood-frame, on carriages and roadsters preceding them, were small and of light weight. That was true substantially of the "tumble-out" composite bodies, even those shown in the two foreign patents, Mouche (French) and Feldwabel (German), the only cited references showing gooseneck hinges, completely concealed in the former but partially concealed in one type of the latter, both having arms of unequal length. Neither, however, presented any problem of alignment because, the doors being half length or gates, hinging them caused no excessive lift of the door. When De Soto, however, brought out, in 1930, the first all-steel closed body con-

struction, the excessive lift did not at first become too serious a problem. Butt hinges (which are pintle-type) supported the De Soto doors. But as soon thereafter the all-steel bodies became more streamlined and curved, the lift became more excessive. Their butt hinges varied in length, then becoming longer and longer, depending upon the steel body's curvature and the door swing, but all these butt hinges were exposed outside the body.

GM's 1939 B.O.P. model was the first all-steel body whose front door's upper hinge was concealed, but its lower hinge was exposed outside the body. Its 1940 Chevrolet model's rear door's upper hinge was exposed, however, and its front door's lower hinge, as in the 1939 B.O.P. model, was also exposed outside the body. Howe, working with Fisher, Mauck, et al., as recited above (p. 8, this Pet.), taught them how to eliminate these exposed hinges per his teachings in '490.

To make clearer to the Court Howe's radical departure from the art antedating De Soto, which is really not pertinent, as well as from Smith and Carr which are pertinent to the art of hinging all-steel doors on all-steel curved bodies, reference will be made to important passages in his description and claims. Carr is not pertinent because of its impracticality, never having been manufactured due to apparent defects, and its hinges are not concealed as that term is understood in the industry.

Replying to Smith's challenge to produce hinges that would not extend "laterally beyond the surface of the body," Howe's description states (P.A. 748, p. 1, col. 2, ll. 9-17):

> "The purpose of the hinge in this respect is to avoid the necessity of comparatively long, outwardly

> projecting hinge elements, such as are ordinarily used in connection with curved doors. This is made possible by use of a single hinge disposed within the plane of the body wall, and whose axis of pivotal movement, if prolonged, passes the top and bottom of the door frame externally thereof."

Beatty, of GM, testified (D.A. I 416-17) that thicker and heavier doors created hinging problems; and that, in any curved body, even bathtub shape, *the mounted hinges follow the door's inclination* (D.A. II 870). Expert Hedeen, of GM, on whom Judge Robson relied so heavily, finally conceded that the weight of the all-steel door affected the inclination from the vertical and, hence, the type of hinge to correct (D.A. II 1414; 1474-75, top).

The Howe description (P.A. 749, p. 2, col. 1, first par.) states, in the most unambiguous language, that his hinge "is not visible either from the interior or from the exterior of the vehicle when the door is closed."

That his hinge is to be mounted on tumble-in bodies is expressed clearly in his description (P.A. 748, p. 1, col. 1, pars. 1, 3, line 34 referring to "later automobile designs"; col. 2, 1st par., next to the last par., and next to the last line) and in his claims (claims 1 and 2 refer to "inclined walls"; claim 3 to "curved door"; claim 4 to "automobile curved body.") There is no semantic or other basis for the attempted construction that, read in conjunction with the description and drawings, "concealed hinge" in the claims embraces a partially concealed hinge, and that the word "body" in the claims embraces a composite wood frame body, so that they read on the partially concealed hinges in Richard, Feldwabel and Mouche (Appendix A, this Pet.) to support their wood frame doors on box-like, or bathtub, types of

bodies, constructed flimsily with a gate, half door or even full door.

So that the Court may see at a glance that the foregoing patents relied on principally by GM do not contain *all* elements in any one of them, and so the patents are not anticipatory of '490, an almost self explanatory chart has been prepared (Appendix A, this Pet.).

Why did not Judge Robson refer to *U. S.* v. *Adams* of whose existence he must at least have known? Notwithstanding the holding therein that an unexpected result negates obviousness, a dispute exists whether the court is bound to inquire only into structural similarities and dissimilarities, or whether it must, to consider the patent in suit "as a whole", also inquire into the inventor's purposes in making the invention and into whether the results are more than merely the production of a cheaper and/or more efficient article (*Commissioner of Patents* v. *Deutsche,* 397 F. 2d 656 (C.A.D.C., 1968)).

The explanation may be that Judge Robson felt bound by the policy of the Court of Appeals for the Seventh Circuit which one reads in disbelief and shock at the *deliberate* disregard of this Court's ruling in *U. S.* v. *Adams.* In *Walt Disney Productions* v. *Niles Communications,* 369 F. 2d 230, (*Nov. 9, 1966*), about 7 months after *U. S.* v. *Adams* held to the contrary, that court said:

> "We note that the District Court, in holding claim 8 to be obvious, emphasized 'In short, plaintiff's combination of known elements produces no unusual or surprising result and is therefore not entitled to a patent.' We think this was an incorrect test, for the 'unusual and surprising result' as a controlling factor has gone with the 'flash of creative genius.'"

While in many cases, the trial court's emphatic, unequivocal conclusion that the patent in suit involved absolutely no invention, relieved it from the need or burden to test patentability by the subtests of proof of commercial acceptance, long-felt want, replacement and the like, may a trial judge also ignore such factors when it states expressly doubt as to its own conclusion, as a matter of law, about the patent's invalidity? That is one of the questions presented in the case at bar, on which clarification by this Court would be appropriate. After presenting the pros and cons, he concluded: "The determination of the issue of validity is not as clear-cut as may be desired." Then why did he not examine into the evidence of the widespread adoption of the Howe hinge, and its replacement of the hinge antedating De Soto and the exposed butt hinges following De Soto, and the impractical Smith fully concealed ball and socket hinge, in accordance with this Court's instruction in *Graham*? No more ingenious hinge for corrective alignment use on doors of all-steel and glass in the streamlined modern automobiles has yet been devised since 1938 to replace Howe's invention.

Ordinarily, a defendant must prove by a clear and convincing preponderance of the evidence his defenses. An exception is made as to the defense of prior knowledge and public use. The burden is cast on him, as in a criminal case, to prove this beyond all reasonable doubt. On principle, why should the burden be less on the defendant, where, as in the instant case, its Answer set up the defense that its employee was the inventor and the plaintiff joined issue by showing he had disclosed his invention, before it was in the public domain or ran afoul of the statutory time limit bars, in confidence in the expectation of

compensation therefor, and that his invention was misappropriated? This case on this fatual pattern goes beyond *U.S. v. Adams* where the Court found that Adams had made no contract with the U.S., much less in a confidential relationship. Should not this Court indicate its guidelines as to burden of proof in a patent infringement suit involving the issue of a confidential disclosure? Two of the cases involving patent infringement and the issue of confidential disclosure, among those in Appendix B, this Petition, have indicated that the defendant must prove invalidity beyond a reasonable doubt. The slightly oversized Petition will not permit further discussion, other than, despite the admittedly scanty precedents on the point, on principle it would be sound to cast such burden, and that the representative cases (by no means a complete list) show such issues have arisen with enough frequency and in all the Circuits, to warrant this Court's attention to such a guideline.

There remains only the question of the presumption of validity on the issue of obviousness. It is a bit unsettled in the various Circuits, some holding that mere omission of the cited reference weakens or destroys the presumption, but the great weight of authority is that there is no presumption that the Patent Office overlooked that citation, that the defendant has the burden of showing lack of consideration, and that where the Record shows the consideration of art equally or more pertinent was considered, the omitted reference is merely cumulative. The Seventh Circuit was in accord with the weight of authority until the case at bar indicates it now holds with the minority.

The defendant's pleadings cited as well the references cited in the file wrapper (P.A. 698; D.A. III 1861-1928).

They show the same disclosures cited by the defendant as non-wrapper file references, all relating to the ante-De Soto wood or composite door and body of old touring cars, roadsters or carriages, whose weight was light relatively and presented no problems of excessive lift and alignment. None of such hinges were suitable or practical for use on heavy, all-steel doors with glass on the modern, closed tumble-in all-steel body automobiles.

In *Artmoore* v. *Dayless*, 208 F. 21, one of the cases listed in Appendix B, this Petition, the Seventh Circuit, at pp. 3-4, in affirming Judge Perry, stated the presumption of validity is not an idle gesture, citing *R.C.A.* v. *Radio Eng.*, 293 U.S. 1, 8 and *Mumm* v. *Decker*, 301 U.S. 168, 171, and that prior C.A. 7 cases cited on p. 4 of this opinion, established that it is as reasonable to conclude that a prior art patent not cited was considered and cast aside, and that "While those of the prior art are disclosed without result, Rogers reduced to practice and with success." (See Judge Perry's charge to the jury to the same effect (D.A. II 1711-12)).

The presumption of validity is strengthened, on the contrary, where relevant prior art has been cited by the Examiner and overcome. Howe testified about the Examiner's citation (D.A. III 1913-1915) of British Patent 17,728 (1913) to Frankfurter Carroserri (D.A. II 1655) and its being overcome, because hinging problems on woodframe carriage and pleasure auto car doors, weighing 5 to 10 pounds, and on all-steel tumble-in bodies, weighing upwards of 100 pounds, were non-analogous, and their solution non-obvious to an ordinarily skilled modern auto body engineer; Raisch cross examined him at great length thereon (D.A. II 1691-1702). The relevancy of this British Patent was asserted by Raisch's law firm soon almost '490 was

granted on May 21, 1940 (D.A. III 1955).[1] The defendant did not cite this reference to this Court because it was overcome in the Patent Office, and because such citation would have deprived it of the contention that the failure of the Patent Office to reveal relevant prior art overcame the presumption of validity.

Defendant did not disprove that the Examiner, consistently with British Patent 17,728 to Frankfurter, regarded its citation of prior patents as cumulative and unworthy of recordation. The plaintiff, on the contrary, introduced into evidence the Examiner's search sheets (P.A. 698-699). The issue of the consideration of the defendant's cited prior patents by the Patent Office must, therefore, be resolved in favor of the plaintiff. Defendant has not sustained the burden of proof. The presumption of validity has not been assailed successfully on the ground that the Examiner had not considered the most pertinent prior patents.

Attorney General Tom C. Clark, later the Associate Justice of this Court who spoke for it in *Graham* and *U.S.* v. *Adams*, stated in his Manual on the Administrative Procedure Act (1948) that Congress intended that § 1009 of Title 5 and §§ 141-45 of Title 35 be applied together since they are not inconsistent (Appendix A, this Petition).

In *Magnaflux* v. *Coe*, 139 F. 2d 531, 532 (C.A. D.C.) it was stated that the presumption of the correctness of the Patent Office decisions runs in favor of the issued patent

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(1) It wrote Haskins of the Fisher Body Patent Division on the 26, 1940 about '490: "I believe that the claims of this patent are palpably void. The idea of having the hinges tilted in both directions is shown in the British Patent to Frankfurter 17,728 of 1913."

in infringement suits. Howe was thus favored with two presumptions in his favor, the presumptions of validity and of correctness.

The reviewing court's comment (booklet, p. 6) that "The patent contains no citations of prior art patents" from which is to be inferred that such failure also weakened the presumption of validity, indicates either lack of knowledge that at the time, in 1940, when '490 issued, it was not the practice to print the patent references at the end of the patent or that it was grasping at any straws to defeat Howe.

There is no evidentiary support in the Record for the legal conclusion that Howe's patent was invalid for obviousness, because many vital and critical facts and issues were overlooked, or not considered, or misconstrued by Judge Robson.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

x indicates the following elements in Howe Pat. No. 2,201,490 *not* present in prior patents and publication Howe Pat. No. 2,201,490	Richard No. 1325109 (1919)	Smith No. 2050469 (1936)	Carr No. 2114836 (1938)	Mouche-French No. 537011 (1922)	Feldwabel Publication (German) (1920)
1. Heavy all-steel *full* doors	x			x	x
2. Tumble-in steel body on modern auto	x		x	x	x
3. Doors with glass	x			x	x
4. Pintle-type hinge		x			
5. Problem disclosed	x		x	x	x
6. Hinging means all fully concealed	x	x	x		x
7. Hinge axis inclined inwardly	x		x	x	x
8. Hinge axis inclined forwardly	x		x	x	x
9. Pintle axis inclined	x	x	x		
10. Hinge axis for bias closing of door	x	x	x	x	x
11. Hinge varying in curvature	x	x	x		
12. Hinge arms of different reach	x		x		
13. Operative—and useful		x	x	x	
14. Long felt need recognized	x		x	x	x
15. Commercially successful	x	x	x	x	x

APPENDIX B

Representative List of Confidential Disclosure Cases Arranged by Circuits Chronologically

District of Columbia

Aktiebolaget v. *U. S.*, 93 F. Supp. 131 (D.C., 1950)
Belt v. *Hamilton Nat. Bk.*, 210 F. 2d 706 (C.A.D.C., 1953)

First Circuit

Tepper v. *Ross*, 25 F. Supp. 92 (Mass., 1938)
Atlantic Wool v. *Norfolk*, 357 F. 2d 866 (C.A. 1, 1965)

Second Circuit

Becher v. *Contoure*, 29 F. 2d 31 (C.A. 2, 1928), 279 U.S. 88
Picard v. *United Aircraft*, 128 F. 2d 632 (C.A. 2, 1942)
Gilbert v. *General Motors*, 133 F. 2d 997 (C.A. 2, 1943)
Matarese v. *Moore Mac Cormack*, 158 F. 2d 632 (C.A. 2)
Berry v. *Glidden*, 92 F. Supp. 909 (S.D., N.Y., 1950)
Kleinman v. *Betty Dain*, 189 F. 2d 921 (C.A. 2, 1951)
Schreyer v. *Casco Products*, 190 F. 2d 921 (C.A. 2, 1951)
Anderson v. *Trico*, 162 F. Supp. 224 (W.D.N.Y., 1953)
Franke v. *Wiltscheck*, 209 F. 2d 493 (C.A. 2, 1953)
Titcomb v. *Norton Co.*, 208 F. Supp. 9 (Conn., 1959)
Sperry Rand v. *Rothlein*, 241 F. Supp. 549 (Conn., 1964)
Lemelson v. *Kellogg*, 259 F.S. 904 (S.D.N.Y., 1966)

Third Circuit

Lorenz v. *Colgate-Palmolive*, 122 F. 2d 876 (C.A. 3, 1941)
Meier v. *Anchor Hocking*, 95 F. S. 265 (W.D.Pa., 1951)
Kirschner v. *West*, 300 F. 2d 133 (C.A. 3, 1962)

Fourth Circuit

Amer. Orn. v. *Orange Crush,* 76 F. 2d 969 (C.A. 4, 1935)
Ches. & Ohio v. *Kaltenbach,* 95 F. 2d 801 (C.A. 4, 1938)
Saco-Lowell v. *Reynolds,* 141 F. 2d 587 (C.A. 4, 1944)
Ackerman v. *Gen. Motors,* 202 F. 2d 642 (C.A. 4, 1953)
Carter Products v. *Colgate,* 230 F. 2d 855 (C.A. 4, 1956)
Servo v. *General Electric,* 337 F. 2d 716 (C.A. 4, 1964)

Fifth Circuit

Samuels v. *Beth. Steel,* 323 F. 2d 944 (1963)

Sixth Circuit

A. O. Smith v. *Petroleum,* 73 F. 2d 531 (C.A. 6, 1934)
Liquid Carb. v. *Goodyear,* 38 F. Supp. 520 (N.D.Oh., 1940)
McEuen v. *Kelley-Mott,* 130 F. 2d 488 (C.A. 6, 1942)
Eaton v. *Ford Motor,* 60 F. S. 801 (E.D.Mich., 1945)
Bradley v. *Great A&P,* 179 F. 2d 636 (C.A. 6, 1950)
Royal Pat. v. *Monarch Tool,* 203 F. 2d 299 (C.A. 6, 1953)
White v. *Owens-Ill. Glass,* 203 F. 2d 694 (C.A. 6, 1953)
Gen. Motors v. *Estate Stove,* 203 F. 2d 912 (C.A. 6, 1953)
Stevens v. *Continental Can,* 308 F. 2d 100 (C.A. 6, 1962)
Pennington v. *Houde,* 136 F. 2d 59 (C.A. 6, 1967)

Seventh Circuit

Booth v. *Stutz Motor,* 24 F. 2d 415 (C.A. 7, 1928)
Shellmar v. *Allen-Qualley,* 36 F. 2d 623 (C.A. 7, 1929)
Lockerbie v. *Fruhling,* 207 F. S. 649 (E.D.Wis., 1932)
Hunady v. *General Motors,* 84 F. 2d 61 (C.A. 7, 1936)
Flanigan v. *Ditto,* 84 F. 2d 490 (C.A. 7, 1936)
Doherty v. *Universal,* 107 F. 2d 548 (C.A. 7, 1939)
Friedman v. *Washburn,* 145 F. 2d 715 (C.A. 7, 1944)
Lewyt v. *Healthmor,* 84 F. S. 189 (N.D., Ill., 1950)
Wilson v. *Seng,* 194 F. 2d 399 (C.A. 7, 1952)
A. O. Smith v. *Dravo,* 203 F. 2d 369 (C.A. 7, 1952)
Northup v. *Reisch,* 200 F. 2d 924 (C.A. 7, 1953)

Artmoore v. *Dayless,* 208 F. 2d 1 (C.A. 7, 1953)
Blaw-Knox v. *Lain,* 230 F. 2d 373 (C.A. 7, 1956)
Pleatmaster v. *Golding,* 240 F. 2d 894 (C.A. 7, 1957)
Borkland v. *Param. Plastics,* 244 F. 2d 501 (C.A. 7, 1957)
Anderson v. *Sears Roebuck,* 265 F. 2d 755 (C.A. 7, 1959)
Continental Can v. *Hocking,* 362 F. 2d 123 (C.A. 7, 1966)

Eighth Circuit

Sandlin v. *Johnson,* 152 F. 2d 8 (C.A. 8, 1945)

Ninth Circuit

Angle v. *Richardson,* 97 F. 2d 736 (C.A. 9, 1938)
Oxnard Conners v. *Bradley,* 194 F. 2d 655 (C.A. 9, 1952)
Pacific Lens v. *Solex,* 209 F. 2d 529 (C.A. 9, 1952)
Filex v. *Antiyent,* 216 F. 2d 443 (C.A. 9, 1954)
Panaview v. *Van Ness,* 135 F. 2d 253 (S.D., Cal., 1955)
Trenton v. *Peterson,* 165 F. S. 523 (S.D., Cal., 1958)
Walker v. *General Motors,* 362 F. 2d 58 (C.A. 9, 1966)

Tenth Circuit

Baker Oil v. *Burch,* 71 F. 2d 31 (C.A. 10, 1934)
Sears Roebuck v. *Jones,* 308 F. 2d 705 (C.A. 10, 1962)